

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-6121

IN THE
COURT OF APPEALS OF
THE UNITED STATES FOR
THE SECOND CIRCUIT

B

X-----X

JOSEPH MARSHALL,

Plaintiff-Appellant,

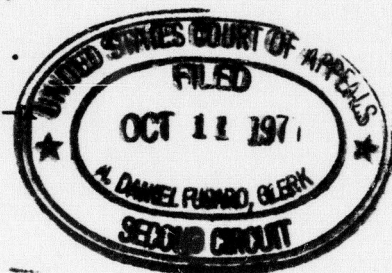
vs.

DOCKET NUMBER
77-6121

UNITED STATES POSTAL SERVICE,

Defendant-Appellee.

X-----X



ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE EASTERN
DISTRICT OF NEW YORK

X-----X

BRIEF FOR PLAINTIFF-APPELLANT

X-----X

ROBERT DAVID BECKER, ESQ.
Counsel for Plaintiff-Appellant

INDEX

TABLE OF CASES	<u>PAGE</u> iii
STATEMENT OF FACTS.....	1
ARGUMENT.....	4

POINT I

THE DECISION OF THE ADMINISTRATIVE
HEARING OFFICER THAT THE APPELLANT
RESIGNED VOLUNTARILY WAS ARBITRARY
AND CAPRICIOUS

- A. IN EXAMINING THIS CASE, THIS COURT SHOULD
APPLY THE ARBITRARY AND CAPRICIOUS TEST
- B. THE RESIGNATION OF THE APPELLANT WAS TOTALLY
INVOLUNTARY.

POINT II

APPELLEE'S FAILURE AT THE CIVIL SERVICE
COMMISSION HEARING TO PRODUCE WITNESSES
WHO WERE PRESENT AT THE PLAINTIFF'S
COERCED RESIGNATION, AND WHO HAD PARTI-
CULAR KNOWLEDGE OF THE CIRCUMSTANCES
THEREOF, CREATES A PRESUMPTION ADVERSE
TO THE APPELLEE.

POINT III

THE ADMINISTRATIVE DECISION THAT JOSEPH
MARSHALL RESIGNED VOLUNTARILY IS
INCONSISTENT WITH PRIOR AGENCY DECISIONS
IN SIMILAR CIRCUMSTANCES.

CONCLUSION.....	16
-----------------	----

TABLE OF CASES

	<u>Page</u>
<u>Brennan v. Gilles & Cotting, Inc.</u> , 504 F.2d 1255 (4th Cir. 1974)	16
<u>Charlton v. United States</u> , 412 F.2d 390 (3d Cir. 1969)	4
<u>Christie v. United States</u> , 518 F.2d 584 (Ct. Claims 1975)	5,9,10
<u>Distrigas of Massachusetts Corp. v. FPC</u> , 517 F.2d 761 (1st Cir. 1975)	15
<u>Fruhauf Southwest Garment v. United States</u> , 111 F. Supp. 945 (Ct. Claims 1953)	5
<u>Golden State Bottling Co. v. NLRB</u> , 414 U.S. 168 (1973)	12
<u>ICC v. Union Pacific Ry. Co.</u> , 222 U.S. 541 (1912)	4
<u>Interstate Circuit, Inc. v. United States</u> , 306 U.S. 208 (1939)	13
<u>McGucken v. United States</u> , 407 F.2d 1349 (Ct. Claims) <u>cert. denied</u> 396 U.S. 894 (1969)	8
<u>NLRB v. Dorn's Transportation Co.</u> , 405 F.2d 706 (2d Cir. 1969)	12
<u>Paroczay v. Hodges</u> , 297 F.2d 439 (D.C.C. 1969)	8
<u>Peerless Mills, Inc. v. American Telephone and Telegraph Co.</u> , 527 F.2d 445 (2d Cir. 1975)	12
<u>Perlman v. United States</u> , 490 F. 2d 928 (Ct. Claims 1974)	8
<u>Rich v. Mitchell</u> , 273 F.2d 78 (D.C.C. 1959) <u>cert. denied</u> 368 U.S. 854 (1961)	8
<u>Teamsters Local 814 v. NLRB</u> , 512 F.2d 564 (D.C.C. 1975)	15
<u>Transcontinental Bus Systems, Inc. v. CAB</u> , 383 F.2d 466 (5th Cir. 1967)	16
<u>United States v. Currency in Total Amount of \$2223.40</u> , 157 F. Supp 300 (N.D.N.Y. 1957)	13
<u>United States v. Professional Air Traffic Controllers Organization</u> , 438 F. 2d 96 (7th Cir.) <u>cert. denied</u> 402 U.S. 915 (1970)	4
<u>Wood v. United States Post Office Department</u> , 472 F. 2d 96 (7th Cir.) <u>cert. denied</u> 412 U.S. 939 (1972)	4

OTHER AUTHORITIES

29 Am. Jur. 2d, <u>Evidence</u> § 237 (1967).	13
Richardson, <u>Evidence</u> , § 92 (Prince ed. 1973).	12

IN THE
COURT OF APPEALS OF
THE UNITED STATES FOR
THE SECOND CIRCUIT

-----x
JOSEPH MARSHALL,

plaintiff-appellant,

vs.

UNITED STATES POSTAL SERVICE,

defendant-appellee.
-----x

DOCKET NUMBER
77-6121

STATEMENT OF FACTS

Joseph Marshall, a veteran, was an employee of the United States Postal Service for approximately eight years. On July 17, 1972, he was accused of theft of mail. At approximately 1:30 P.M. of that day, Postal Inspector Duquette employed by the U.S. Postal Service, and two other postal inspectors, apprehended Mr. Marshall, inspected his locker at the post office, took him into a parked car, and interrogated him for approximately one hour. During the interrogation time Inspector Duquette urged Mr. Marshall to resign in order to save his accrued employment benefits. During this interrogation, Mr. Marshall was never advised of his constitutional rights even though the appellee contends otherwise.

The Inspectors drove Mr. Marshall away to the Postal Inspector's Station and then to the Federal Building to be photographed and fingerprinted. He was taken to the detention pens for approximately one hour. Mr. Marshall had never been arrested previously.

Mr. Marshall was allowed to call an attorney, Perry Fish, who arrived before the arraignment. Mr. Fish was able to speak to his client for only 20-30 minutes before the arraignment.

In the courtroom, Mr. Marshall overheard a conversation between Mr. Fish and Inspector Duquette where Inspector Duquette told Mr. Fish that it would be better if Mr. Marshall resigns.

Based on the information given to him by Inspector Duquette, Mr. Fish, who was primarily involved in the criminal aspect of the case, and who had no personal knowledge of the workings of the Civil Service system, conveyed the message to Mr. Marshall that to protect whatever employment benefits were accruing to him, he ought to resign.

At approximately 6:30 P.M. of the same day, Mr. Marshall, who had never been accused of a crime in his life, "....very nervous, very broken up, very scared," signed a resignation form dictated to him by Inspector Duquette. Several weeks afterward, Mr. Marshall signed a form supplied to him by the postal service stating that his resignation was voluntary.

Mr. Marshall was arraigned, and on January 4, 1974, all charges against him were dismissed. The long length of time between the arrest and dismissal was due to continuances requested by the government.

After dismissal of the indictment, Mr. Marshall requested that the Postal Service reinstate him and grant him back pay, but the Postal Service refused and continues to refuse to do so.

At a hearing before the United States Civil Service Commission Federal Employee Appeals Authority, the Postal Service prevailed. The United States Civil Service Commission Appeals Review Board concurred with the decision below, and the United States District Court for the Eastern District of New York dismissed Mr. Marshall's complaint.

ROBERT DAVID BECKER

ATTORNEY AT LAW
150 EAST 58TH STREET
NEW YORK, N.Y. 10022

This case comes before this Court pursuant on an appeal in
forma pauperis.

ARGUMENT

I

THE DECISION OF THE ADMINISTRATIVE HEARING OFFICER THAT THE APPELLANT RESIGNED VOLUNTARILY WAS ARBITRARY AND CAPRICIOUS.

The decision of the administrative officer that Mr. Marshall resigned voluntarily was not firmly grounded on the evidence presented at the hearing. The facts demonstrate the contrary, that Mr. Marshall resigned involuntarily. The decision of the hearing officer had no rational basis in the evidence. It was arbitrary and capricious.

A. IN EXAMINING THIS CASE, THIS COURT SHOULD APPLY THE ARBITRARY AND CAPRICIOUS TEST.

While a test of whether an administrative decision was based on substantial evidence is the prevailing standard of judicial review of such decisions, see ICC v. Union Pacific Ry Co., 222 U.S. 541, 547-548(1912); Charlton v. United States 412 F. 2d 390 (3d Cir. 1969); in cases involving discharges or disciplinary actions against government employees, there has been utilized a test of whether the agency decision was arbitrary and capricious. United States v. Professional Air Traffic Controllers Organization, 438 F. 2d 79, 80-81 (2d Cir.) cert. denied, 402 U.S. 915 (1970), Wood v. United States Post Office Department, 472 F. 2d 96 (7th Cir.) cert. denied, 412 U.S. 939 (1972).

In Wood, supra, the Court expounded upon this principle in a terse note:

Under the "arbitrary and capricious" standards, our review is confined to the question of whether there is a "rational basis" in the evidence for the conclusions and inferences which the Service drew.¹ Supra at 99.

Thus, in examining the record below, this Court should apply the arbitrary and capricious test, and it must ask whether there was a

1. Yet, the Court continued to say that, "It is questionable whether different quantities of evidence would be needed to fulfill the substantial evidence and the arbitrary and capricious tests."

rational basis in the evidence for the decision of the hearing officer below.

B. THE RESIGNATION OF THE APPELLANT WAS TOTALLY INVOLUNTARY.

There was no rational basis for the finding of the United States Civil Service Commission Federal Employee Appeal Authority that Mr. Marshall's resignation was obtained without duress, time pressure, intimidation or deception. That decision was arbitrary and capricious and should be reversed by this Court.

The evidence demonstrates that the resignation was involuntary, that it was the fruit of the coercive and deceptive acts on the part of the postal inspector, and that it was the product of duress.

While the Courts have not arrived at a precise definition of duress, Fruhauf Southwest Garment v. United States, 111 F. Supp. 945, 951 (Ct. Claims 1953), case law does show that:

"three elements are common to all situations where duress has been found to exist. These are:

- (1) that one side involuntarily accepted the terms of another;
- (2) that circumstances permitted no other alternative; and (3) that said circumstances were the results of coercive acts of the opposite party. "Supra at 951.

Christie v. United States, 518 F. 2d 584, 587 (Ct. Claims 1975).

This tripartite test is met in the instant case. First, it is clear from an examination of the record that Mr. Marshall did not voluntarily submit his resignation. He states that this resignation was "not voluntary", that it "was pressured". (Transcript 20, Appendix 48. Hereinafter cited as Tr. and Ap.). Second there was no other real alternative available to Mr. Marshall except to resign. Upon facing the prospect of being

terminated in disgrace and losing his accrued employment benefits (or so he was told), Mr. Marshall accepted the only course of action available to keep intact the honor and the monetary benefits he had worked hard for over his years in the post office.

Thirdly, and very importantly, the resignation of Mr. Marshall was the result of the coercive acts of the appellee. The postal inspectors seized Mr. Marshall, accused him of a crime, searched his locker, took him to a parked car with three postal inspectors, never informed him of his constitutional rights, never allowed him to speak to a union representative, urged him in no uncertain terms to resign, and took him to federal detention facilities for arraignment on criminal charges. Finally, through Mr. Marshall's own attorney, Mr. Fish, the postal inspectors again urged Mr. Marshall to resign lest he face shame and loss of accrued benefits. All of this happened within the span of five to six hours, adding up to coercion on the part of the appellee.

These actions and pressures of the postal inspectors were undertaken with one goal in mind: the resignation of the accused, Joseph Marshall. In fact, by Inspector Duquette's own admission, once a postal employee is arrested for theft of mail, "an attempt to get im out of the postal service is made...."(Tr. 78, Ap. 75). Inspector Duquette further states that it is part of his job to get an accused postal worker out of the postal service, even before an adjudication of guilt or innocence is made.² With such an avowed purpose on the part of this postal inspector, it cannot be gainsaid that he would pressure and coerce an employee such as Mr. Marshall into resigning.

The Federal Personnel Manual Supplement 752-1, S1-2 also explains those factors which may render an employee resignation involuntary:

2. Even so, Inspector Duquette states earlier in the record that he is aware that under the American system of jurisprudence, a man is presumed innocent until proven guilty (Tr 73).

... if the agency uses deception, duress, time pressure or intimidation to force an employee to chose a particular course of action, the action is involuntary.

It is contended that all of these factors existed in the instant case, making Joseph Marshall's resignation involuntary.

The resignation was a product of deception. Inspector Duquette told Mr. Marshall and his attorney, Mr. Fish, that Mr. Marshall would be best off in resigning, so as to protect accrued employee benefits and avoid the disgrace of being fired. Mr. Fish and Mr. Marshall both testified to this at the hearing below. Inspector Duquette did not deny saying this, but in fact admitted that it was "possible" that he told Mr. Fish that Mr. Marshall would be best off in resigning. (Tr. 79, Ap. 76). Inspector Duquette demonstrates his duplicity in this area by later stating at the hearing that actually there would be no advantage in resigning. (Tr. 80, Ap. 77). It should be noted in the decisions of Robert Maier (Ap. 21) and Louis Abbruzzese (Ap. 14), the Civil Service Commission ordered the two letter carriers involved reinstated in large part because of the deceptive advice given to the carriers by postal agents concerning the advantages of resignation.

The resignation was also the product of duress and intimidation. Mr. Marshall was at the mercy of the three postal inspectors and the advice they gave him. This was an emotionally charged situation for Mr. Marshall; and Inspector Duquette, through the power he commanded in the situation, and through his desire to get the accused, Mr. Marshall, out of the postal service one way or another (Tr 82, Ap. 78), took advantage of his position of strength to get Mr. Marshall to resign involuntarily.

Furthermore, the resignation was a product of time pressure. The entire episode of arrest-interrogation-arraignment took place in only five

to six hours. In this time and in these tense moments, Mr. Marshall had to make a precipitous decision whether or not to resign. With the interrogations and criminal procedures occurring within that time, Mr. Marshall did not have the opportunity to make a careful, deliberate consideration of what action to take.

In Perlman v. United States, 490 F2d 928 (Ct. Claims 1974), the Court granted the plaintiff's motion to remand based on his assertion that his retirement was time pressured and thus not voluntary. There, the plaintiff only had a matter of a few hours to decide whether to retire so as to protect certain retirement benefits the plaintiff believed he might lose if he delayed. There, the Court noted that the plaintiff did not have adequate time in which to authoritatively inform himself as to the alternatives available in the situation.

Similarly, in the instant case, Mr. Marshall could not adequately inform himself of and consider the available courses in the few, hurried moments he had.

This is not a situation as in McGucken v. United States, 407 F. 2d 1349, (Ct of Claims) cert. denied, 396 U.S. 894 (1969); or Rich v. Mitchell, 273 F. 2d 78 (D.C.C. 1959) cert. denied, 368 U.S. 854 (1961); where a government employee had three days to consider the advisability of resignation, but a situation where the time was much more limited. See Paroczay v. Hodges, 297 F. 2d 439 (D.C.C. 1961); Perlman v. United States, 490 F2d 928 (Ct. Claims 1974).

The failure of the appellant and his attorney to request additional time in which to consider choosing between resignation and termination, and their failure to attempt to withdraw the resignation after Mr. Marshall had more time to reflect on the choice he had made is understandable in light of the postal inspector's misrepresentations, and is certainly

ROBERT DAVID BECKER

ATTORNEY AT LAW
150 EAST 80TH STREET
NEW YORK, N.Y. 10022

not indicative of, as the hearing officer below has found, the resignation being obtained without undue time pressure. On the strength of Inspector Duquette's misrepresentations, Mr. Fish advised Mr. Marshall to resign to protect his accrued benefits, and to postpone the issue of employment until after all criminal charges had been favorably disposed of.

With all these factors considered, it becomes apparent that Mr. Marshall did not resign voluntarily. He was forced into a hasty resignation by the pressure brought to bear upon him by the appellee. The failure of the hearing officer below to recognize this indicates that the decision was arbitrary and capricious.

The appellee, below argued that the presence of an attorney at Mr. Marshall's resignation indicates that the resignation was not obtained through duress or intimidation. This is an untenable argument.

First of all, while the appellant did have an opportunity to discuss his situation with Mr. Perry Fish, the attorney, the discussion only lasted approximately twenty minutes. Furthermore, Mr. Fish was unfamiliar with civil service procedure, and admits that his primary purpose and concern was to assist the appellant with the criminal matter (Tr. 46, Ap. 58). Mr. Fish advised Mr. Marshall to resign prior to the arraignment, in reliance upon a statement made by Inspector Duquette to the effect that Mr. Marshall would be best off in resigning, lest he lose all accrued benefits (Tr. 46, Ap. 58).

Judge Neaher, in his Memorandum and Order below cites Christie v. United States, 518 F. 2d 584, 587-588 (Ct. Claims 1975) as refuting the voluntariness of Mr. Marshall's resignation since he was merely faced with two unpleasant alternatives. Yet, the Christie case also states that, when there are also

agency misrepresentations, and reliance thereon as a basis for the resignation, such a resignation is involuntary. Supra.

In the instant case, Mr. Marshall was not merely faced with two unpleasant alternatives. He resigned in reliance on the misrepresentations of Inspector Duquette as to accrued benefits.

Further as in the Christie case, in a vigorous and eloquent dissent by Judge Skelton, it is pointed out that the plaintiff in that case was:

...bitterly opposed to resigning. She was merely trying to keep body and soul together. She was led to believe by the misrepresentations and coercion of the agency that the only way she could do this was by resigning.... The over reaching and unconscionable conduct all occurred on the part of the agency. In short, she was forced out against her will. This sort of conduct should not be condoned, much less approved. Supra at 593.

Judge Skelton looked carefully to the facts of the case. He noted that the plaintiff in Christie was the founder and head of the agency from which she resigned, and that in 1968, two male employees became head of the agency and embarked on a course of harassment of the plaintiff to provoke her and get rid of her, regardless of the means or the cost. The dissent also pointed out the incredibility of the agency's version of the facts. Judge Skelton said that an injustice had been done in Christie.

Similarly, in this instant case, this Court must look to the facts carefully to insure that an injustice is not done. Inspector Duquette had a stated purpose of getting Mr. Marshall out of the postal service merely because Mr. Marshall was accused of a crime. While Mr. Marshall had not yet had his day in Court, he was already considered guilty by the appellee.

Inspector Duquette has been encouraged to get Mr. Marshall out of the postal service even though there is a union directive and understanding with the postal service management (Ap. 12) not to initiate or discuss resignation with a postal employee (Tr. 93-94, Ap. 79-80). This memorandum ,

ROBERT DAVID BECKER

ATTORNEY AT LAW
150 EAST 58TH STREET
NEW YORK, N.Y. 10022

although not put into effect until 1973, which is after the resignation, only confirmed the prior understanding between the union and management. Jack Leventhal, the union representative at the hearing below so stated (Tr. 93-94, Ap. 79-80), and his testimony was uncontradicted. Inspector Duquette admits that he might have told Mr. Marshall that he would be best off in resigning (Tr. 79, Ap. 76), although the inspector knew that would not in fact have been to Mr. Marshall's benefit, and he had not stated such fact to Mr. Marshall (Tr. 80, Ap. 77). In addition, Mr. Marshall was not advised of his right to discuss his employment problem with his union representatives, although Inspector Duquette assumed that Mr. Marshall was a member of the union (Tr 72, Ap. 73).

The appellee through this course of coercion, deception, time pressure and intimidation, forced Mr. Marshall to involuntarily resign from his position with the U.S. Postal Service.

The failure of the hearing officer below to carefully consider all the facts which palpably point to the conclusion that the resignation of Mr. Marshall was involuntary, demonstrates that the administrative decision had no rational basis in the evidence, and was thus arbitrary and capricious.

It is strongly urged that this Court order Mr. Marshall be reinstated to his former position with the United States Postal Service with back pay, or, that this case be remanded.

II

APPELLEE'S FAILURE AT THE CIVIL SERVICE COMMISSION HEARING TO PRODUCE WITNESSES WHO WERE PRESENT AT THE PLAINTIFF'S COERCED RESIGNATION, AND WHO HAD PARTICULAR KNOWLEDGE OF THE CIRCUMSTANCES THEREOF, CREATES A PRESUMPTION ADVERSE TO THE APPELLEE.

Where one party to civil litigation has control over a witness having particular knowledge of the facts underlying the asserted claim, and that party fails to produce such witness, the trier of fact may draw an adverse inference against that party. Golden State Bottling Co. v. NLRB, 414 U.S.168 (1973), NLRB v. Dorn's Transportation Co. 405 F 2d 706 (2d Cir. 1969); Peerless Mills, Inc. v. American Telephone and Telegraph Co. 527 F 2d 445 (2d Cir. 1975), Richard/^{son} Evidence, § 92 (Prince ed. 1973).

In the instant case, there were three postal inspectors in the car with Mr. Marshall when he was pressured into resigning, but at the hearing before the Civil Service Commission, the appellee produced only one of these three to testify, Inspector Duquette. This might have been sufficient to establish the defendant's version of the occurrence in question, but for the fact that Inspector Duquette, by his own admission, did not recall what happened at the time of Mr. Marshall's resignation. (Tr. 60-62, Ap. 64, 65).

The testimony of Inspector Duquette was inadequate and weak. He was only capable of testifying as to what "normally happens in such cases", (Tr. 60, Ap. 64), he was unqualified to testify authoritatively as to what transpired in the incident with Mr. Marshall, Inspector Duquette did "not recall". (Tr. 60, Ap. 64).

When questioned, as to facts of Mr. Marshall's resignation, Inspector Duquette further demonstrated that he was unsure of what transpired. For example, when asked if he discussed resignation with Mr. Marshall, Inspector Duquette responded that it was "possible". (Tr. 67, Ap. 68). When asked if he spoke to Mr. Marshall's attorney on the day of the arrest, Inspector

Duquette answered that it too was "possible", (Tr. 70, Ap. 71) but that he does not really recall (Tr. 72, Ap. 73). Similarly, Inspector Duquette said that it was "possible" that he dictated the wording for Mr. Marshall's resignation statement (Tr 75), and that it was "possible" that he told Mr. Fish that Mr. Marshall would be best off in resigning (Tr 79, Ap. 76).

Such testimony certainly does not evince a thorough grasp of the events surrounding Mr. Marshall's resignation. Thus, the proper action for the appellee would have been to produce the other two postal inspectors who were with Mr. Marshall at the time of his resignation. But this was not done.

A similar situation was involved in Interstate Circuit, Inc. v. United States, 306 U.S. 208 (1939). There, the failure of a corporate defendant to offer the testimony of corporate officers who knew the facts regarding a particular transaction, resulted in an adverse inference being drawn against such defendant. The Supreme Court enunciated the rule that:

The production of weak evidence when strong is available can lead only to the conclusion that the strong would have been adverse.... Silence then becomes evidence of the most convincing character.

In the instant case, there must be an adverse inference drawn against the defendant due to its producing weak testimony when strong was available.

At the hearing the appellant should have produced the two other postal inspectors present at Mr. Marshall's resignation. By Inspector Duquette's own admission, both inspectors were still in the employ of the Postal Service and both were in New York City at the time of the hearing.

Thus, the failure of the appellee to produce the two other postal inspectors can only lead to an inference that had their testimony been offered, it would have been unfavorable to the appellee. United States v. Currency in total Amount of \$2223.40, 157 Supp. 300 (N.D.N.Y. 1957); 29

AM. JUR 2d Evidence § 237 (1967).

The additional testimony of the missing witnesses would have clarified the facts and circumstances underlying the plaintiff's coerced resignation. It is suggested to this Court that their testimony would have been in accord with that of Messrs. Marshall and Fish, who stated that Inspector Duquette suggested resignation as the best possible alternative. Their testimony would further have established that misrepresentation and coercion was used to obtain the appellant's resignation.

Neither the hearing officer nor the Appeals Board recognized this presumption, or the appellee's burden to rebut it. The failure to consider these factors indicates that the decisions of the examiner and the Appeals Board had no rational basis in the evidence, and was arbitrary and capricious.

III

THE ADMINISTRATIVE DECISION THAT JOSEPH MARSHALL
RESIGNED VOLUNTARILY IS INCONSISTENT WITH PRIOR
AGENCY DECISIONS IN SIMILAR CIRCUMSTANCES.

An agency has a duty to apply its policies in a minimally responsible and evenhanded way. Distrigas of Massachusetts Corp. v. FPC, 517 F 2d 761, 765 (1st Cir. 1975). This requires that an agency must reconcile within reason its precedents, and avoid inconsistent decisions. Teamsters Local 814 v. NLRB, 512 F. 2d 564, 571 (D.C.C. 1975).

The facts involved in the case of Louis J. Abbruzzese (Ap. 14) are very similar to the facts in the instant case. Postal inspectors accused Mr. Abbruzzese of a crime and he later submitted his resignation. The Superintendent of Mails in the New Jersey Post Office in which Mr. Abbruzzese was employed, advised Mr. Abbruzzese to resign rather than be fired, so that he may protect his pension rights. The Civil Service Commission decided that in relying upon erroneous information supplied to him by a person in authority, Mr. Abbruzzese was no longer capable of a free will act within the meaning of Commission regulations, and that his resignation was involuntary. The commission rescinded Mr. Abbruzzese's resignation, and restored him to his former position with salary retroactive to the date of his separation.

Similarly, in the case of Robert D. Maier (Ap. 21), postal inspectors accused the appellant of non-delivery of certain mail. Mr. Maier's supervisor advised him that if he resigned, all charges would be dropped, that it would not be on his record, and that his chances of reinstatement would be greater. Since this information was erroneous, the Civil Service Commission found that the resignation was obtained through deception, and was thus not voluntary. Mr. Maier's resignation and separation from the post office was cancelled.

As in the above cases, in the instant case, the resignation was obtained through deception. Inspector Duquette testified before the Civil Service Commission that it was his practice to remove an employee accused of a crime from the postal service (Tr. 78, Ap. 75) and that he might have told employees in such circumstances that they would be best off in resigning (Tr. 79, Ap. 76), when in fact there was no such advantage to resigning (Tr. 80, Ap. 77). Joseph Marshall testified that Inspector Duquette told him to resign in order to save his pension rights (Tr. 16, Ap. 44). Mr. Fish, a member of the Bar, and a witness entirely disinterested in the outcome of this case testified that Inspector Duquette told him just prior to Mr. Marshall's arraignment, that if Mr. Marshall doesn't resign, he will be fired immediately, and if fired, he will lose all his accrued benefits, (Tr. 46, Ap. 58), inferring that Mr. Marshall would salvage benefits by resigning, which in fact was erroneous.

Given the similarity of facts between the claims of Messrs. Maier, Abbruzzese and Marshall, the decisions in all three cases should have also been similar. Yet they were not. This departure in Mr. Marshall's case has been made without explanation or rational justification. Transcontinental Bus Systems, Inc. v. C.A.B., 383 F 2d 466 (5th Cir. 1967); Brennan v. Gilles & Cotting Inc. 504 F 2d 1255 (4th Cir. 1974).

to
Much/the appellant's detriment, the Civil Service Commission has clearly failed to reconcile within reason its prior decisions. Thus the decision that Mr. Marshall's resignation was voluntary is entirely arbitrary and capricious because of the total inconsistency with prior agency decisions rendered in very similar factual situations.

CONCLUSION

The facts and circumstances of this case demonstrate that the resignation

of Joseph Marshall was involuntary. The failure of the agency decision below to recognize this, its failure to make use of the adverse inference against the appellee, and its failure to reconcile this decision with prior cases all demonstrates that such decision had no rational basis in the evidence presented, and was thus arbitrary and capricious.

The appellant respectfully requests that this Court order Joseph Marshall reinstated with pay retroactive to date of resignation.

Respectfully submitted,

ROBERT DAVID BECKER, ESQ.
Attorney for Plaintiff-Appellan
150 East 58th Street
New York, N.Y. 10022
(212) 486-0535

